

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
	)	
<b>NATIONWIDE PROGRAMMATIC</b>	)	
<b>AGREEMENT REGARDING THE</b>	)	WT Docket No. 03-128
<b>SECTION 106 NATIONAL HISTORIC</b>	)	
<b>PRESERVATION ACT REVIEW</b>	)	
<b>PROCESS</b>	)	

To: The Commission

**COMMENTS**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (“Blooston”), on behalf of its clients listed in Attachment A hereto and pursuant to Rule Section 1.419 of the Commission’s Rules, hereby submits comments to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding regarding the draft Nationwide Programmatic Agreement (“Nationwide Agreement”) to tailor and streamline procedures for review of certain Undertakings for communications facilities under the National Historic Preservation Act of 1966 (“NHPA”).

**Statement of Interest**

The entities listed in Attachment A represent a variety of rural telephone company interests and small businesses that are engaged in the provision of wireless services to the public. Each as a significant interest in the outcome of this proceeding because each will benefit from the exclusion of certain Undertakings that are unlikely to affect Historic Properties from Section 106 review. These entities will also benefit from efforts to streamline the Section 106 process for Undertakings that remain subject to review as well as the adoption of standardized procedures for completing Section 106 review.

## **I. Consultation with Tribal Interests**

The draft Nationwide Agreement attached to the NPRM contains alternative proposals addressing how licensees, tower owners and their consultants should engage Native American tribal interests and the Commission's obligation to consult on a government-to-government basis with federally-recognized tribes. While it is difficult to overstate the importance of being respectful of legitimate tribal interests, the Blooston Commenters believe that one of the main purposes behind adopting a programmatic agreement would be defeated if the Section 106 exclusions set forth at Section III.A. of the Nationwide Agreement are not treated as absolute exclusions.

According to Section I.D of the Nationwide Agreement, the agreement does not apply to tribal lands unless it has been adopted by the tribe in question. Therefore, tribes are free to adopt the Nationwide Agreement or to reject it if it does not sufficiently protect their interests. However, if the final Nationwide Agreement includes language that has been proposed at Section III.B, small business and rural telephone company applicants could be required to notify and seek approval from tribal authorities before engaging in any construction projects that take place merely in the vicinity of (but not on) tribal lands<sup>1</sup> *even where such Undertakings are otherwise exempt from Section 106 review*. Because including Section III.B as proposed would impose *additional* notice requirements on tower projects that would otherwise be excluded from review, the Blooston Commenters must oppose this approach; instead, it may be appropriate for the FCC to develop a set of tribal consultation and notice criteria that address legitimate tribal interests, but that stand apart from the Nationwide Agreement.

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<sup>1</sup> "Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities." 36 C.F.R. § 800.16(x).

In cases where no Section 106 exclusion applies, then Section IV of the Nationwide Agreement sets out specific steps that Applicants should follow to identify Native American tribes that may attach religious and cultural significance to potentially affected historic properties. These steps offer tribes a full opportunity to participate in the process; to refer tribal requests for government-to-government consultation to the Commission; and to maintain confidentiality of private or sensitive information. In this regard, the Blooston Commenters urge the FCC to adopt an unambiguous definition of what constitutes an affected tribal interest that is fair to all parties, or the Nationwide Agreement could actually create new and difficult-to-identify obstacles for licensees.

## **II. Public Participation and Consulting Parties**

Under the Nationwide Agreement, applicants are authorized to grant “consulting party” status to individuals or organizations with a demonstrated legal or economic interest in the project, or with a demonstrated expertise or standing as a representative of local historic preservation interests. The NPRM seeks comment on procedures whereby individuals or groups that are denied consulting party status may petition the FCC for review of such denial. Because the Nationwide Agreement does not specify a time period for public and local government response, the Conference, the Ohio SHPO and Verizon Wireless have suggested that the Nationwide Agreement be amended to specify such a time period.<sup>2</sup> While these additional procedures could result in a brief extension of the consultation process, the Blooston Commenters support this proposal because it would add to the certainty and finality of the Section 106 consultation process.

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<sup>2</sup> NPRM at A-16 (Note 10).

In addition, CTIA has expressed concerns regarding consulting parties' treatment of confidential and proprietary information (*e.g.*, information about alternative sites) that may be included in an applicant's siting proposal.<sup>3</sup> CTIA is therefore recommending that the Nationwide Agreement include a confidentiality clause that is binding on all parties. The Blooston Commenters support CTIA's confidentiality proposal.

### **III. Assessing Effects on Historic Properties**

The Nationwide Agreement sets forth procedures for applicants to follow when identifying historic properties and evaluating adverse effects. PCIA has suggested alternative language to establish that construction of a facility will not cause a visual adverse effect except where the facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of an historic property, where such elements are important elements of that historic property's eligibility.<sup>4</sup> Because PCIA's alternative language is equally protective of historic properties as the language used in the draft Nationwide Agreement but does not start from a presumption of facilities having a visual adverse effect, the Blooston Commenters support the adoption of PCIA's proposed language.

### **IV. Procedures for Submitting Projects to the SHPO/THPO**

For tower projects that fall within scope of the Nationwide Agreement, applicants are responsible for making an initial determine of whether there are no historic properties affected, no adverse effect on historic properties, or an adverse effect. The applicant would then be required to prepare a "submission packet" of a form and substance dictated

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<sup>3</sup> NPRM at A-16 (Note 11).

<sup>4</sup> NPRM at A-19 (Note 13).

by the Nationwide Agreement, and to submit this packet together with required documentation to the SHPO/THPO and to all consulting parties. PCIA has suggested the addition of language that would create a 30-day review period for any consulting party to submit to the applicant a description of its reasons for disagreement.<sup>5</sup> The applicant would then have the choice of consulting with the party to resolve the disagreement, or asking the FCC to review the finding on which the objection is made. The Blooston Commenters support PCIA's proposed language because this 30-day period would run concurrently with the 30-day period for SHPO/THPO review of the submission packet, and it would appear to put a reasonable time limit on the filing of objections by consulting parties. The Blooston Commenters further support language recommended by CTIA and PCIA with respect to tolling of the 30-day period and restarting of a new 30-day review period where a submission packet is deemed deficient by a SHPO/THPO and resubmitted by an applicant.

#### **V. Filing of Uniform Documentation (the "Submission Packet")**

The Advisory Council on Historic Preservation ("Council") has developed specific forms designed to facilitate the filing of uniform documentation with the SHPO/THPO. Where a tower project is not exempt from Section 106 review under the Collocation Agreement or the Nationwide Agreement, and the applicant is proposing construction of a new tower, the Form NT (New Tower) should be completed by or on behalf of the Applicant and submitted to the SHPO/THPO. The Blooston Commenters support the proposed form of the submission packet because uniform documentation requirements should make it less likely that necessary documentation is overlooked by

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<sup>5</sup> NPRM at A-20 (Note 14).

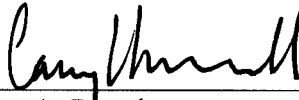
the applicant or the SHPO/THPO. Moreover, it will provide certainty as to when the review period specified in the Nationwide Agreement will begin, and it will facilitate prompt review and response by the SHPO/THPO and consulting parties.

### **CONCLUSION**

Wherefore the Blooston Commenters urge the Commission the adopt the Nationwide Agreement with certain modifications consistent with the foregoing comments.

Respectfully Submitted,

**THE BLOOSTON COMMENTERS**



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## **Attachment A**

A list of the small businesses and rural telephone companies that comprise the “Blooston Commenters” is provided below.

- Golden West Telecommunications Cooperative, Inc. (and its subsidiary GW Wireless, Inc.)
- Interstate Telecommunications Cooperative, Inc. (and its subsidiaries Stateline Telecommunications, Inc. and Interstate Satellite Services, Inc.)
- James Valley Cooperative Telephone Company (and its subsidiary Northern Valley Wireless, Inc.)
- Kennebec Telephone Company, Inc.
- McCook Cooperative Telephone Company (and its subsidiaries Hanson County Telephone Company and Hanson Communications, Inc.)
- Midstate Communications, Inc. (and its subsidiary Midstate Wireless, Inc.)
- Mobile Phone of Texas, Inc.
- Penasco Valley Telephone Cooperative, Inc. d/b/a Peñasco Valley Telecommunications (and its subsidiaries PVT Networks, Inc. and PVT Wireless Limited Partnership)
- Santel Communications Cooperative
- SRT Communications, Inc. (and its subsidiary North Dakota Network Co.)
- Splitrock Telecom Cooperative, Inc. (and its affiliate Baltic Telecom Cooperative)
- Valley Telecommunications Cooperative Association, Inc. (and its subsidiary Valley Cable & Satellite Communications, Inc.)
- Venture Communications, Inc. (and its subsidiary Venture Wireless, Inc.)
- West River Cooperative Telephone Company